TAYLOR *et al. v.* SUTHERLIN-MEADE TOBACCO CO. *et al.*

Jan. 16, 1908.

On Petition to Amend Order, Jan. 30, 1908.

[60 S. E. 132.]

1. Attachment—Affidavit—Sufficiency.—Under Code 1904, §§ 2959, 2964, requiring the affidavit in attachment to be made by "the plaintiff, his agent or attorney," an affidavit signed by the "secretary and treasurer" of a corporation does not on its face show that it was made by the agent of the corporation; the court not taking judicial knowledge of the fact that such officer is, by virtue of his office, the agent of the corporation, and Code 1904, § 3225, allowing service or process on the president, treasurer, or other chief officer, etc., of a corporation, not being a legislative recognition of the authority of the treasurer as the legal representative of the corporation in all legal matters.

2. Corporations—Corporate Powers and Liabilities—Representation by Officers.—The powers of a private corporation, so far as its dealings with third persons are concerned, are primarily lodged in its board of directors, from which source the officers, either expressly or by implication, derive such authority as is bestowed upon them.

3. Receivers—Claims—Distribution of Assets—Taxes—Priorities.—Under Code 1904, § 492b, providing that no decree or order shall be entered directing the payment or distribution of any funds, etc., or other property under the control or in the hands of any receiver, etc., until all taxes, etc., on such funds or other property are paid, or unless the payment thereof be provided for in such decree or order, it was the duty of the court, before distributing the assets of an insolvent foreign corporation for which a receiver was appointed, to provide for the payment of taxes and levies due by the corporation as superior to the claims of the receiver or of attaching creditors.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 42, Receivers, §§ 276, 277.]

On Petition to Amend Order.

4. Appeal—Determination—Attachment—Proceedings—Affidavit—Amendment.—Courts acquire jurisdiction in attachments in equity alone by force of the affidavit, and on appeal, in a case founded on an insufficient affidavit, the appellate court cannot remand the case to permit an amendment of the proceedings on which the attachment was issued, but can only abate the attachment and dismiss the proceedings, in the absence of application to amend the affidavit in the trial court.

Appeal from Corporation Court of Lynchburg.

Bill in attachment by the Sutherlin-Meade Tobacco Company against the Commonwealth Tobacco Company, a foreign corporation chartered in New Jersey, but doing business in Virginia. Jerome Taylor, who was appointed both in New Jersey and Virginia receiver of defendant's property in creditors' suits against defendant by George P. Butler, filed his petition, claiming title as such receiver to defendant's property. The state of Virginia and the city of Lynchburg filed petitions, asserting claims against the assets for taxes. The attachment suit and the suit of George P. Butler against defendant were heard together, and from a decree upholding an attachment levied on defendant's property, the receiver and Geo. P. Butler appeal. Reversed

Scott & Buchanan, for plaintiffs.
Caskie & Coleman and *Wilson & Manson,* for defendants.

WHITTLE, J. This is an attachment in equity, sued out by the appellee, the Sutherlin-Meade Tobacco Company, against the Commonwealth Tobacco Company, a foreign corporation, formerly engaged in the manufacture of tobacco at Lynchburg, Va. to attach the property of the defendant company in this state and subject it to plaintiff's debt.

There was a motion to quash the attachment, because the affidavit upon which it was issued does not show that it was made by "the plaintiff, his agent or attorney," as required by the present statute (Va. Code 1904, §§ 2959, 2964), which motion was overruled, and the defendant appealed.

It may be well to notice, in this connection, that formerly the statute did not require the affidavit to be made by "the plaintiff, his agent or attorney," but provided only that "on affidavit at the time or after the institution of the suit, * * * the clerk shall issue an attachment," etc. Code Va. 1873, p. 1009, c. 148, § 2; Benn *v.* Hatcher, 81 Va. 25, 35, 59 Am. Rep. 645.

In this instance the affidavit was made by the secretary and treasurer of the attaching company, and the single question involved in this preliminary contention is whether the words "secretary and treasurer," *ex vi termini,* import that such officer is the agent of the corporation.

The rule governing attachment proceedings is thus stated in McAllister *v.* Guggenheimer, 91 Va. 317, 319, 21 S. E. 475: "In this state statutes have been enacted declaring the manner in which the property of such debtors [nonresident debtors] may be subjected to the payment of their liabilities, when there is no lien upon the property for their payment. Independent of these statutes, a court of equity has no jurisdiction to subject such debtor's property in favor of a creditor at large. The remedy invoked in this case being one wholly derived from statute law,

and one which is harsh in its operation toward the party against whom it is directed, and also toward the creditors of such debtor over whom the attaching creditor obtains priority, must upon its face show that the requirements of the statute have been substantially complied with"—citing 4 Min. Inst. (Last Ed.) 404, 405; Thatcher *v.* Powell, 6 Wheat. (U. S.) 119, 15 L. Ed. 221; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565; Tate *v.* Liggatt, 2 Leigh, 99, 100; Daniel on Attachments, §§ 11, 12.

In the recent case of Merriman Co. *v.* Thomas, 103 Va. 24, 48 S. E. 490, the court said, in construing an analogous statute requiring the affidavit of "the plaintiff or his agent" to an account filed with a declaration in assumpsit (Va. Code 1904, § 3286), that, in the absence of averment of agency in the affidavit, the plaintiff's "bookkeeper" would not be held to be his agent, observing: "The statute makes an innovation upon the established mode of procedure in such cases, and a plaintiff, in order to take advantage of it, must proceed in accordance with its provisions." The distinction is also drawn between an agent and other employee, and authorities cited to illustrate that distinction:

"An agent is one employed and authorized to represent and act for another, and the distinguishing features of the agent are his representative character and his derivative authority." Mechem on Agency, § 1.

The same author thus draws the line of demarcation between the relation of principal and agent and that of master and servant: "The true distinction is to be found in the nature of the undertaking and the time and manner of its performance. Agency properly relates to transactions of business with third persons, and it implies more or less of discretion in the agent as to the time and manner of his performance. Service, on the other hand, has reference to actions upon or about things. It deals chiefly with manual or mechanical execution, in which the servant acts under the direction and control of the master." Id. § 2.

The court, at page 28 of 103 Va., and page 491 of 48 S. E., remarks:

"In 2 Cyc. p. 5, concerning affidavits and who may make them, it is said that 'in determining this question reference must always be had to the statutes and rules of court governing the particular affidavit. Thus, where a statute specifically points out who may make a certain affidavit, it can be made by no other than those specified.'

"If the statute had prescribed that the affidavit should be made by the plaintiff in person, then it could have been made by no one else; and when it is declared that it must be made by the 'plaintiff or his agent,' the courts must be content to construe the language employed.

"While a bookkeeper may be, and often is, the agent of his employer, the word does not, *ex vi termini,* import that relation, and in the absence of averment in the affidavit that it exists the courts cannot by intendment enlarge the ordinary signification of the word, so as to bring it within a class to which it may or may not belong."

So in this case, unless the court is prepared to announce as a matter of law that the words "secretary and treasurer" necessarily denote the existence of the relation of agency between affiant and the attaching corporation, then the attachment must fall.

The general doctrine is well settled that the powers of a private corporation, so far as its dealings with third persons are concerned, are primarily lodged in its board of directors, from which source the officers, either expressly or by implication, derive such measure of authority as may be bestowed upon them.

Mr. Cook discusses the subject as follows: "The board of directors have the widest of powers. All of the various acts and contracts which a corporation may enter into are entered into by and through the board of directors. The board of directors make or authorize the making of the notes, bills, mortgages, sales, deeds, liens, and contracts generally of the corporation. They appoint the agents, direct the business, and govern the policy and plans of the corporation. The directors elect the officers, and in this connection it may be added that at common law there is no limit to the number of offices which may be held simultaneously by the same person, provided that neither of them is incompatible with any other. They institute, prosecute, compromise, or appeal suits at law and in equity which the corporation brings or has brought against it." 2 Cook on Corporations (5th Ed.) § 712; Morawetz on Private Corp. §§ 509-511.

With respect to the powers of the president of a corporation it is said: "The office itself, however, confers no power to bind the corporation or control its property. The president's power as an agent must be sought in the organic law of the corporation, in a delegation of authority from it, directly or through its board of directors, formally expressed or implied from a habit or custom of doing business." 10 Cyc. 903; 2 Cook on Corp. (5th Ed.) § 716; Morawetz on Pri. Corp. § 537. See also, Crump *v.* U. S. Mining Co., 7 Grat. 352, 56 Am. Dec. 116; Hodges' Ex'r *v.* Bank, 22 Grat. 60.

"The secretary of a corporation has no power, merely as secretary of the company, to make contracts for it. The secretary is one of the corporate officers, but he has practically no authority. The corporation may, of course, expressly authorize the secretary to contract for it, or may accept and ratify his contracts after they are made. The treasurer of a corporation has no power, merely by reason of his office, to contract for the corporation."

2 Cook on Corp. (5th Ed.) § 717. "A secretary is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all." Section 717, note.

In 4 Thomp. on Corp. §§ 4714, 4716, the author says of the treasurer of a private corporation that he is "a mere ministerial agent or employee, and that he does not possess, "by virtue of his office, any implied or *ex officio* powers of which the courts will take judicial notice." To the same effect is 3 Clark & Marshall on Private Corporations, § 703.

These principles are sustained by numerous decisions of courts of the highest respectability, and are laid down by standard writers on private corporations as well-settled law.

A number of cases have been adduced by learned counsel for the appellees touching the implied authority of a secretary and treasurer to represent his company.

Bristol Bank *v.* Keavy, 128 Mass. 298, is cited for the proposition that a treasurer can emplov an attorney to collect unpaid bills. But the conclusion of the court in that case was largely influenced by the fact that the treasurer was acting "under the immediate direction of one of the officers of the demandant corporation who had special charge of that class of matters to which the one in question belonged." See page 302. In 4 Thomp. on Corp. § 4726, that case is explained, and in the later case of Craft *v.* So. Boston R. R. Co., 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641, a different conclusion is reached.

In White Hall Co. *v.* Hall, 102 Va. 284, 46 S. E. 290, the familiar doctrine is announced that "admissions and representations made by an agent of a corporation, acting within the scope of his authority and concerning matters intrusted to him, are binding upon the corporation. Cook on Corp. (4th Ed.) § 726."

In Sparks *v.* Dispatch Transfer Co., 104 Mo. 531, 15 S. W. 417, 12 L. R. A. 714, 24 Am. St. Rep. 351, the president had been held out as having authority to act for the corporation, and the court held that it was bound by his acts. To the same effect are Ceeder *v.* Loud, etc., Co., 86 Mich. 541, 49 N. W. 575, 24 Am. St. Rep. 134, and Sherman Center Town Co. *v.* Swigart, 43 Kan. 292, 23 Pac. 569, 19 Am. St. Rep. 137.

In *Ex parte* Sergeant, 17 Vt. 425, it was held that, under a statute requiring "the plaintiff to file an affidavit" (a corporation being plaintiff, and consequently unable to comply literally with the requirement), "the statute would ingraft an exception on itself in favor of an agent or head of a corporation," and that the affidavit could be made by "the president of the bank, who is the head of the corporation."

In St. Louis, etc., R. Co. *v.* Fowler, 113 Mo. 458, 20 S. W. 1069, it was held that the application for a change of venue by

a corporation might be verified by the affidavit of any officer or agent of the corporation.

In Moline, etc., *v.* Curtis, 38 Neb. 520, 57 N. W. 161, the attachment was based on an affidavit which showed on its face that affiants were agents of their corporation, and the trial court allowed the plaintiff to amend by inserting that they were also "Sec'y & Treas.," which it was said cured the "alleged defect."

In Chicago, etc., R. Co. *v.* Coleman, 18 Ill. 297, 68 Am. Dec. 544, the court held the admissions of the president of a railroad company, who had been held out and treated as the executive head of the corporation, made in the ordinary course of his employment, binding upon the company.

In Forbes Lithograph Mfg. Co. *v.* Winter, 107 Mich. 116, 64 N. W. 1053, it was held that an affidavit by an officer of the company as to the correctness of the account sued on was sufficient under the Michigan statute, which provided that in any action brought on an account, "if the plaintiff or some one in his behalf" should make an affidavit of the amount due, it should be deemed *prima facie* evidence of such indebtedness.

In the two cases of Corcoran *v.* Snow Cattle Co., 151 Mass. 74, 23 N. E. 728, and Merchants' Nat. Bank *v.* Gaslight Co., 159 Mass. 505, 34 N. E. 1083, 38 Am. St. Rep. 453, it was held that the treasurers of certain trading and manufacturing corporations in that state have authority, by virtue of their office, to make notes on behalf of the company. Mr. Thompson, in discussing the subject, shows that the doctrine of these cases is peculiar to Massachusetts, and that it rests upon an established custom, which obtains with respect to the dealings of that class of corporations in that state, and it not in accord with the weight of authority elsewhere. Thomp. on Corp. §§ 4720-4722. That the rule is not of universal application, even in Massachusetts, is shown by the case of Craft *v.* South Poston R. Co., *supra.*

The reports abound with cases, of which the foregoing are examples, in which corporations have been made responsible for acts of persons holding themselves out as agents—sometimes officers of the company transcending the limits of their authority, or even strangers assuming to act and acting as agents, with knowledge of the company; but that class of cases is wholly beside the mark in a case where the company itself is seeking to make an act done by one of its officers in excess of his general authority the foundation of rights against another.

We find nothing in these decisions in conflict with the general proposition that a court cannot take judicial knowledge of the fact that the secretary and treasurer of a private corporation, *virtute officii,* is agent of the corporation in contemplation of the attachment statutes.

The provision found in Va. Code 1904, § 3225, which allows

service of process upon the president, treasurer, or other chief officer, etc., of a corporation, is also relied on as legislative recognition of the authority of the treasurer as the legal representative of the corporation in all court proceedings; but it is manifest that the exact language of the enactment is not susceptible of any such broad construction.

Nor are we prepared to concede that a ruling contrary to the contention of the appellees will operate as disastrously upon business enterprise as counsel apprehend. We are placing no restrictive limitation upon the powers of the secretary and treasurer of a private corporation in his transactions with third parties, whether such authority be derived from statute, charter, by-laws, custom, or other delegation, express or implied. The extent of our pronouncement is that the court cannot say, as matter of law, in the absence of averment, that the term "secretary and treasurer" necessarily imports the relation of agency between such officer and his corporation, within the intendment of the attachment acts. Correct practice requires the affidavit to aver that affiant is "the plaintiff, his agent or attorney," according to the fact, and the compliance with rule imposes no undue hardship upon the attaching creditor.

We are therefore of opinion that the trial court erred in overruling the motion of the defendant to abate the attachment.

While this view will operate a dismissal of the bill in the attachment proceeding, and renders consideration of other assignments of error in that litigation unnecessary, it leaves unaffected the companion case of Butler *v.* Commonwealth Tobacco Company (no opinion).

The latter case is a suit in behalf of all creditors of the company. The bill alleges the pendency of a suit in the chancery court of New Jersey, where the company was chartered, to administer the assets (to which end a receiver had been regularly appointed), and prays that an auxiliary receiver may be appointed to take possession of the Virginia assets, and for their administration under the direction and in accordance with the decrees of the chancery court in the principal case.

The state of Virginia and the city of Lynchburg filed petitions asserting claims against the assets for taxes due by the company for the year 1904.

By the decree appealed from the trial court held that the Sutherlin-Meade Tobacco Company had a lien upon the tangible chattel property of the debtor corporation, by virtue of its attachment, prior in right to the claim of Taylor, receiver, and to the city of Lynchburg for taxes, but that the city's demand, *quod* the proceeds of sale of intangible property, was superior to any right or claim of the receiver.

The city assigns cross-error, under rule 9, to the priority al-

lowed the Sutherlin-Meade Tobacco Company as to the tangible property.

Though that particular question is no longer vital, we are of opinion that under the general doctrine which obtains in such cases, and in accordance with the provisions of Va. Code 1904, § 492b, the duty devolved upon the court, before distributing the fund under its control, to provide for payment of taxes and levies due by the company. It would, indeed, be an anomalous result if either the receiver or attaching creditors could come into the courts of the state and invoke their aid to take charge of and administer the assets of an insolvent foreign corporation (thereby preventing the state and city from exercising their right to levy on the property of such corporation to enforce payment of taxes), and at the same time deny the power of the court to discharge the taxes out of the fund that it is called on to administer.

It is the universal rule that a court, as the representative of the sovereignty of the state, will make no order for the distribution of funds in *custodia legis* until provision is made for payment of taxes and levies due to the commonwealth and its municipalities. Alderson on Receivers, 205; In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; Greely *v.* Provident Savings Bank, 98 Mo. 458, 460, 11 S. W. 980; Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150; 2 Cooley on Taxation, 834, also note 5.

For the foregoing reasons, the decree complained of must be reversed, the bill in the attachment case will be dismissed, and the creditors' suit, which was heard with it, will be remanded for further proceedings not in conflict with the views expressed in this opinion.

Reversed.

Upon a Petition to Amend Order.

PER CURIAM. The prayer of the petition of the appellees that the order entered in this case at a former day of the present term be so far modified as to remand the case to the corporation court for the purpose of enabling the appellants to prove the agency of the secretary and treasurer of the company is denied.

Courts acquire jurisdiction in attachments in equity alone by force of the affidavit; and on appeal, in a case founded on an insufficient affidavit, this court can only abate the attachment and dismiss the proceeding, in the absence of application to amend the affidavit in the trial court. This seems to be the universal rule in jurisdictions where there is no statutory authority for amending the affidavit.

Denied.

Note.

This case was the subject of an editorial in 13 Va. Law Reg. p. 902.